

CII Petitions Stock Exchanges for Majority Voting and Focuses on Director Tenure and Universal Ballots in Contests

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The Council of Institutional Investors in June [petitioned](#) the NYSE and Nasdaq to require majority voting for the election of directors in uncontested elections. CII also wants the exchanges to mandate that incumbent directors who do not receive majority support to promptly resign from the board.

While 78% of S&P 500 companies have adopted majority voting, that percentage falls to 52% for mid-cap companies and only 19% for small-caps. CII's petition goes far beyond the majority voting policies that companies have adopted, however, as those boards would not immediately require the resignation of a director who did not receive the requisite support. Instead, those directors would offer to resign, and boards retain discretion to consider and accept or reject the offer. This discretion is the real concern for CII. They complain that only half of directors ultimately leave their boards after failing to receive majority support.

The CII petition cites to Commonwealth Reit and Nabors as examples of companies this season where boards refused to accept the resignation of directors who were forced to make the offer under the companies' majority voting policies, after not receiving majority support. In both instances, the companies explained that accepting the resignations would "not be in the best interests" of the companies. The Toronto Stock Exchange has proposed a rule that would require its listed companies to have majority voting by the end of 2013, if adopted. In 2012, it changed to a "comply or explain" scheme regarding majority voting, as well as mandating annual elections for directors.

At the end of July, CII will also consider policy [changes](#) linking director tenure with director independence and supporting a universal ballot for proxy fights. CII's new policy may ask boards to consider a director's years of service in determining director independence. According to the proposed policy, 26% of all Russell 3,000 directors have served more than 10 years and 14% have served more than 15 years. It does not advocate for any specific tenure, unlike the European Commission, which advises that non-executive directors serve no more than 12 years. In the United Kingdom, directors with more than nine years of service are deemed non-independent unless the company can explain otherwise. A recent WSJ [article](#) focused on directors serving more than 40 years with the same company.

In addition, CII may adopt a new policy that opposing sides engaged in a contested election should use a proxy card naming all management-nominees and all shareholder-proponent nominees, providing every nominee equal prominence on the proxy card. This universal proxy concept would require SEC rules to change to be effective. CII points to the actions in the Canadian Pacific proxy contest where both management and Pershing Square used universal ballots.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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